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## Blades of Steal - The Fight for Control of Sports Clubs' Websites and Media Rights in Madison Square Garden, L.P. v. National Hockey League

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## Casenote

### BLADES OF STEAL? THE FIGHT FOR CONTROL OF SPORTS CLUBS' WEBSITES AND MEDIA RIGHTS IN *MADISON SQUARE GARDEN, L.P. V.* *NATIONAL HOCKEY LEAGUE*

#### I. "WANT TO GO?" AN INTRODUCTION

The gloves have been dropped in the fight for the future of professional sports leagues with the first legal altercation between a professional sports club and league over the ownership of Internet and new media rights.<sup>1</sup> Though clashes between a "rogue" owner and the authority of a professional league over antitrust law are not unique in the sports arena, such issues have typically involved matters of relocation, television broadcasts, or traditional sponsorship.<sup>2</sup>

Unsurprisingly, the dispute involves the only league in which gloves are able to be dropped legally, the National Hockey League ("NHL"), which has struggled to reestablish steady revenue after a lockout resulted in the cancellation of the 2004-2005 season, has found itself dodging haymakers thrown by the New York Rangers.<sup>3</sup> Madison Square Garden, L.P. ("MSG"), a subsidiary of cable juggernaut Cablevision, owns the Rangers.<sup>4</sup> MSG has accused the league

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1. See David Naylor, *New Media, New Squabble for NHL*, THE GLOBE AND MAIL, Oct. 5, 2007, <http://www.globesports.com/servlet/story/RTGAM.20071005.wspt-nhl-spat-05/GSSStory/GlobeSportsHockey/?page=rss&id=RTGAM.20071005.wspt-nhl-spat-05> (recognizing importance of MSG antitrust suit against NHL).

2. See *id.* ("A rogue owner willing to take on the authority of a professional sports league is not unique."). "Oakland Raiders owner Al Davis successfully took on the NFL a quarter-century ago. Similarly, James Dolan, the chief executive officer of Madison Square Garden, is a maverick." *Id.*

3. See Gary Thorne, *NHL vs. Rangers May be Key Clash This Season*, USA TODAY, Nov. 1, 2007, [http://www.usatoday.com/sports/hockey/columnist/thorne/2007-11-01-nhl-rangers-case\\_N.htm](http://www.usatoday.com/sports/hockey/columnist/thorne/2007-11-01-nhl-rangers-case_N.htm) (providing basic explanation of suit and potential ramifications in wake of lockout).

4. See Larry Brooks, *Breaking the Nice*, N.Y. Post, Sept. 30, 2007, [http://www.nypost.com/seven/09302007/sports/rangers/breaking\\_the\\_nice.htm?page=0](http://www.nypost.com/seven/09302007/sports/rangers/breaking_the_nice.htm?page=0) (discussing financial status of league after lockout). In a letter to twenty-nine other NHL owners, Dolan wrote, "After sacrificing a season to set our player cost economics on a proper footing, we believe that the League continues to squander opportunities to improve our business and solidify and grow our fan base." See *id.*; see also Associated Press, *Leafs Most Valuable NHL Team, Forbes Rates*, MSNBC.COM, Nov. 8, 2007, <http://www.msnbc.msn.com/id/21697592/> (discussing Forbes Magazine article that determined that "Original Six" member Rangers operate in largest cable market in country and boast net worth of \$365 million, second only to Toronto Maple Leafs at \$413 million).

of squandering opportunities to improve its business and solidify the league's fan base through its post-lockout initiatives, thereby violating section 1 of the Sherman Antitrust Act by stripping the Rangers of its ability to be "responsive to [its] fans" and "react to changing business opportunities or events."<sup>5</sup>

The debate reinvigorates the clash between clubs in large and small markets.<sup>6</sup> Teams operating in large markets, such as the Rangers, believe that they can generate greater profits through independent control of their various property rights.<sup>7</sup> In contrast, sports leagues seek to protect the collective interests of the league, as well as smaller market teams that predominantly benefit from having a league effort that generates fan interest and revenue that these teams could not accomplish individually.<sup>8</sup> As a result, a Rangers' victory in its antitrust suit would threaten the competitive structure of a league forced to implement a hard salary cap to address the growing disparity in revenue generated between teams.<sup>9</sup>

The potential implications of this disagreement could also inflict a knockout on other professional leagues that have been allocated teams' intellectual property rights and streamlined their Web presence with common templates under a central league office, including Major League Baseball ("MLB"), the National Football League ("NFL"), and the National Basketball Association ("NBA").<sup>10</sup> If MSG were to win its antitrust suit, the resulting opinion could seriously constrain the rights of any sports league to collectivize property rights when even a single team desires to opt out

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5. See Brooks, *supra* note 4 (discussing how NHL failed to take any meaningful initiatives regarding globalization, other than redesigning clubs' uniforms to capitalize on retail sales).

6. See Thorne, *supra* note 3 (raising discussion of large market versus small market dynamic present in antitrust claims).

7. See *id.* (stating position of large market teams).

8. See *id.* (discussing opposing views of small market teams in generating revenue through media rights).

9. See Brooks, *supra* note 4 (describing effects of hard salary cap on teams' individual interests).

10. See Hilary Potkewitz, *Dolan Confronts NHL Brass over Rangers' Site*, 23 CRAIN'S N.Y. BUS. 41, Oct. 8, 2007, available at 2007 WLNR 20111934 (noting other leagues with central league office controlling Web presence of teams and streamlining websites with common templates); see also Posting of Marc Edelman to Sports Law Blog, *New York Rangers File Antitrust Lawsuit Against NHL*, <http://sports-law.blogspot.com/2007/10/new-york-rangers-file-antitrust-lawsuit.html> (Oct. 4, 2007, 16:27 EST) [hereinafter *New York Rangers File Antitrust Lawsuit*] ("This suit is especially interesting in that it seeks to reverse what is now more than a 40-year trend of sports leagues expanding the allocation of property rights at the league level.").

of a proposed agreement.<sup>11</sup> Furthermore, all prior non-unanimous league votes effectuating allocation of broadcast and merchandising rights and revenue sharing could be called into question.<sup>12</sup> Consequently, the stakes of collectivization are even greater for the NHL since, whereas other sports leagues have become heavyweights by generating significant revenue from league-sponsored activities, the NHL has remained in the lightweight ranks, with ninety-three percent of its revenue garnered at the local level.<sup>13</sup>

Accordingly, this Casenote will engage in a discussion of the legal implications of league control of Internet and marketing rights through the lens of the ongoing slugfest between MSG and the NHL.<sup>14</sup> Section II will provide the play-by-play of the dispute, highlighting the events which instigated the Rangers' allegations of anticompetitive tactics against the NHL.<sup>15</sup> It will also detail the code of conduct regulating the fight, namely the Sherman Antitrust Act of 1890.<sup>16</sup> Section III will detail the district court's dismissal of MSG's motion for a preliminary injunction in order to analyze the court's application of Section 1 of the Act and discuss whether the Rangers' assertions are viable under a "quick look" or Rule of Reason analysis.<sup>17</sup> Furthermore, Section IV will explore whether the NHL could successfully assert a "single-entity" defense if the case went to trial, exempting the league from amenability to antitrust law altogether in the market of Internet and new media.<sup>18</sup> Finally, Section V will conclude by reestablishing the potential implications

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11. See *New York Rangers File Antitrust Lawsuit*, *supra* note 10 (exploring potential implications of MSG win in lawsuit).

12. See *id.* (describing how outcome could essentially mandate unanimous voting to effectuate any league action).

13. See Eric McErlain, *The Ice Sheet: Rangers Take League to Court Over Web Control*, FANHOUSE, Oct. 1, 2007, <http://sports.aol.com/fanhouse/2007/10/01/the-rundown> (stating that only seven percent of total revenue of NHL is from media and merchandising deals). Likewise, despite the fact that thirty percent of NHL players are European, the league currently derives only \$4 million from European operations. See *id.* In comparison, the NBA pockets around \$125 million per year. See *id.*

14. For a further discussion of the dispute between MSG and the NHL, see *infra* notes 20-237 and accompanying text.

15. For a further discussion of the history of the dispute between MSG and the NHL, culminating in the subject lawsuit, see *infra* notes 20-38 and accompanying text.

16. For a further discussion of the provisions contained in section 1 of the Sherman Act, see *infra* notes 39-43 and accompanying text.

17. For a further discussion of the dismissal of MSG's motion for a preliminary injunction by the district court, see *infra* notes 64-84 and accompanying text.

18. For a further discussion of the "single entity" exemption to the Sherman Act, see *infra* notes 180-238 and accompanying text.

of the decision on the NHL and other professional sports leagues that employ a similar marketing structure.<sup>19</sup>

## II. THE INITIAL TIE UP: BACKGROUND OF MSG'S DISPUTE WITH THE NHL

### A. Implementation of NHL New Media Strategy

As early as 1996, the NHL began to take initial steps to improve the strength of the league brand by providing fans with more multidimensional hockey coverage that emphasized the importance of league games and news.<sup>20</sup> A critical element of this national brand-building strategy was a centralized NHL website to encourage and facilitate Internet traffic by fans among various clubs' websites.<sup>21</sup> The member clubs of the NHL, agreeing that the right to develop and exploit the Internet as a marketing tool resided in the league itself, granted Commissioner Gary Bettman broad discretion to carry out the NHL's objectives through the entity NHL ICE, including authority to make decisions regarding advertising and marketing rights.<sup>22</sup>

In June 2000, the teams modified their approach, concluding that the optimal business model was a hybrid where the league's and clubs' websites would be integrated, with certain elements available on the clubs' sites and others accessible on NHL.com.<sup>23</sup> Internet regulations promulgated by Commissioner Bettman included setting aside a portion of each team website as an NHL area for league content, reserving for the league the right to con-

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19. For a further discussion of the potential repercussions of the antitrust suit, see *infra* notes 239-50 and accompanying text.

20. See *Madison Square Garden, L.P. v. NHL*, No. 07 CV 8455 (LAP), 2007 WL 3254421, at \*1 (S.D.N.Y. Nov. 2, 2007) (describing initial step taken by NHL to expand hockey to compete with other sports and entertainment offerings).

21. See *id.* (finding that goal of NHL was to "translate the passion of fans for their local teams into League-wide support" to generate additional value for league).

22. See *id.* at \*2 (explaining alliance with IBM, later "NHL ICE," to initiate Internet presence). The NHL clubs had already signed away to the league, on an exclusive basis, the worldwide rights to use or license team trademarks for advertising, sale, and distribution of products and services to maximize the value of intellectual property rights. See *id.* The Rangers approvingly voted on that grant. See *id.*

23. See *id.* (noting board's unanimous reaffirmation that league possessed right to exploit clubs' intellectual property on Internet, based on rules promulgated by Commissioner).

trol thirty-five percent of all advertising on each club's website, and requiring merchandising sales to be made through the league.<sup>24</sup>

Further, in December 2005, the Commissioner formed a committee comprised of ten teams to develop a plan to maximize new media revenues.<sup>25</sup> This New Media Committee concluded that the best approach for the NHL would be to transfer each team's site onto a common technology platform, serviced by a single content management system ("CMS").<sup>26</sup> Individual clubs would be held responsible for supplying local content and advertising, while the NHL would retain space for national advertising and league news.<sup>27</sup> Under this plan, the NHL could attract national sponsors by selling inventory across all club websites, thereby achieving a critical mass for advertisers and reducing transaction costs involved with negotiating advertising space.<sup>28</sup>

MSG objected to the New Media Committee's considerations by expressing concern that small market teams would benefit at the expense of large market teams, amounting to revenue sharing.<sup>29</sup> Despite the Rangers' objections, the league voted to proceed with the plan set forth in the Committee's report, extend the license agreements held by the NHL for an additional ten years, and grant to the NHL the exclusive ability to exploit various new media rights.<sup>30</sup>

In February 2007, the NHL and the Rangers met privately to discuss the adopted Internet regulations.<sup>31</sup> After failing to reach an agreement, the Rangers launched three initiatives that violated league rules: setting up an Internet store for selling Rangers' merchandise, inserting "virtual advertising and signage" into the broad-

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24. *See id.* (delineating club regulations). The Rangers made no objection to these regulations. *See id.*

25. *See id.* at \*3. "[The Committee] found that most clubs were not using their websites as marketing or sales promotions tools at all; were not utilizing best practices or up-to-date technology; and that most Clubs had not adequately monetized their websites." *Id.* James Dolan declined a position on the Committee. *See id.*

26. *See Madison Square Garden*, 2007 WL 3254421, at \*3 (stating basic plan for centralized league control).

27. *See id.* (describing division of responsibility between league and club). Reasons identified for the transition included: Ensuring minimum quality standards across team sites, enabling greater interconnectivity, facilitating sharing of local content, and the creation of two million dollars in savings. *See id.*

28. *See id.* (explaining economic efficiencies resulting from plan).

29. *See id.* (presenting Rangers' open rejection of idea of revenue sharing amongst small and large market teams).

30. *See id.* at \*4 (describing final agreement).

31. *See id.* (noting meeting to discuss "differences of opinion on a variety of issues").

casts of Ranger home games, and streaming live broadcasts of Rangers games to Internet subscribers in the team's local broadcast territory.<sup>32</sup>

The league responded in April 2007 with a cease and desist letter that indicated that the Rangers would be fined \$100,000 per day if they continued to incur such violations.<sup>33</sup> Though the organization eventually backed down from its actions in violation of the New Media Strategy,<sup>34</sup> MSG soon thereafter filed a complaint for injunctive relief, claiming it was required to "hand over its website" and that the NHL planned to "take over" their website, [newyorkrangers.com](http://newyorkrangers.com).<sup>35</sup>

The complaint also alleged that the NHL had become an "illegal cartel" in its attempts to prevent off-ice competition between and among clubs, with no legitimate competitive justification for seizing the Rangers' website other than to suppress or eliminate competition.<sup>36</sup> Similarly, MSG asserted that the New Media Strategy was not "reasonably necessary for the success of the NHL venture" and constituted a "naked horizontal restraint in the absence of competitive justification."<sup>37</sup> In November 2007, the District Court for the Southern District of New York denied MSG's motion for a preliminary injunction.<sup>38</sup>

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32. *See id.* (describing MSG's actions in violation of New Media Strategy).

33. *See id.* (stating response of league to violations).

34. *See id.* (asserting that MSG remained in violation for two days). During meetings that summer, the Rangers insisted on operating their website, [newyorkrangers.com](http://newyorkrangers.com), from its own server instead of migrating the site to a single CMS, or, alternatively, allowing the NHL to run a parallel site, [rangers.nhl.com](http://rangers.nhl.com). *See id.* The NHL, however, found this unacceptable because unanimous approval was essential to ensure minimum quality standards and facilitating fan navigation. *See id.* Having failed to reach a deal, the NHL informed the Rangers that, at the start of the 2007-2008 season, the team would be fined \$100,000 for each day that it operated its website out of the league platform. *See id.* at \*5.

35. *See id.* at \*5 n.5 (outlining basis for complaint under Sherman Act).

36. *See id.* at \*5 (alleging violation of antitrust laws because not "reasonably necessary" and constituted "naked horizontal restraint"). MSG also sent a letter out to the other 29 NHL owners, which stated:

We have repeatedly expressed our belief that individual clubs could achieve the same or better results by entering the new media business on their own terms, rather than being mandated to submit to a league-wide initiative. Moreover, the NHL's projection of revenues and implementation of this plan has been flawed – the June projected results were already \$12.6 million behind plan for the first two years, even after reducing spending by \$2.7 million.

McErlain, *supra* note 13.

37. *Madison Square Garden*, 2007 WL 3254421, at \*5.

38. *See id.* at \*9 (stating judgment of motion). The decision was subsequently affirmed by the Second Circuit in March 2008. *See generally* *Madison Square Garden, L.P. v. NHL*, No. 07-4927-cv, 2008 WL 746524 (2d Cir. March 19, 2008) (find-

## B. Sherman Act of 1890

The Sherman Act contains two main provisions.<sup>39</sup> Section 1 outlaws “every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”<sup>40</sup> Because every contract could be construed as a restraint of trade if section 1 was literally applied, the Supreme Court has held that for a claim to be actionable under the Sherman Act, the subject contracts, combinations and conspiracies challenged must impose an unreasonable restraint on trade or commerce.<sup>41</sup> Moreover, the Act only applies to interstate commerce and not to either intra-state trade or interstate activity that is not commerce.<sup>42</sup> In addition, a defendant corporation may present certain defenses including the “single entity” defense in which it claims that apparent restraints are, in fact, the unified acts of a single enterprise.<sup>43</sup>

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ing MSG’s argument to be without merit). In June, the NHL retaliated by filing a counter-complaint for breach of contract, contending that MSG breached its contract by challenging league rules, pursuant to Article 3.10 of the NHL constitution, and requesting suspension or termination of MSG ownership of the Rangers. See Lynn Zinsler, *NHL Hits Back After Suit by Rangers*, N.Y. TIMES, June 20, 2008, <http://www.nytimes.com/2008/06/20/sports/hockey/20rangers.html> (discussing disciplinary threat made by NHL).

39. See 15 U.S.C. § 1-2 (2004) (stating Act). Under Section 1, “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.” *Id.* § 1. Section 2 makes it unlawful for a company to “monopolize, or attempt to monopolize,” trade or commerce through improper means. *Id.* § 2.

40. *Id.* § 1. Single economic entities are not subject to section 1 scrutiny because there must be an agreement between at least two independent economic actors (commonly called “concerted action”) to satisfy the “contract, combination . . . or conspiracy” requirement. See Edward Mathias, Comment, *Big League Perestroika? The Implications of Fraser v. Major League Soccer*, 148 U. PA. L. REV. 203, 206 (1999). Accordingly, “[t]he traditionally organized professional sports leagues have long argued that they are in fact single entities, and that their practices are, therefore, not subject to section 1 challenges that various league rules tend to attract,” since a sports league is “a unique business, containing an unusual but necessary mixture of interparticipant competition and cooperation not found in any other kind of partnership or joint venture.”

*Id.* at 209. However, the actions of a single corporation can still be regulated under section 2 of the Act. See *id.* at 206.

41. See, e.g., *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984) (“[A]s we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.”).

42. See Gregory Pelnar, *Antitrust Analysis of Sports Leagues*, LEXICON, 41 (Oct. 12, 2007), [http://mpr.aub.uni-muenchen.de/5382/1/MPRA\\_paper\\_5382.pdf](http://mpr.aub.uni-muenchen.de/5382/1/MPRA_paper_5382.pdf) (addressing scope of Act). Although section 1 prohibits concerted anticompetitive behavior, it does not regulate unilateral action, which is instead governed exclusively by section 2. See *id.*

43. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (finding that parent and subsidiary may have “unity of purpose or a common design” for antitrust purposes); see also *Am. Needle, Inc. v. New Orleans, Louisiana Saints*, 496 F. Supp. 2d 941, 942 (N.D. Ill. 2007) (noting unique structure of



### C. Proving Antitrust Violations Under the Sherman Act

Conduct may be found to be an illegal restraint of trade under either the doctrine of per se illegality or Rule of Reason standard.<sup>44</sup>

#### 1. *Per Se Illegality*

Per se illegality may be “invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”<sup>45</sup> It is appropriate where the challenged practice is “entirely void of redeeming competitive rationales.”<sup>46</sup> A plaintiff must only demonstrate that the defendant engaged in the alleged conduct, that the conduct had little anticompetitive effect is no defense.<sup>47</sup> Therefore, practically, the doctrine of per se illegality will only be applied to a particular course of conduct after courts have had considerable experience with the type of conduct challenged and have continually found that the conduct produces proscribed consequences in such a significant proportion of cases that a more probing inquiry in every instance would be wasteful of judicial resources.<sup>48</sup> Action which has been found to constitute a per se violation includes horizontal price fixing (i.e., price fixing by producers of competing products), vertical price fixing (i.e., buyer and seller agreement on a specific resale price) and allocation of markets or customers.<sup>49</sup>

#### 2. *Rule of Reason Analysis*

Conduct which is not deemed a per se offense is, alternatively, judged under a Rule of Reason analysis.<sup>50</sup> A Rule of Reason analysis

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sports leagues as business entities); *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 598 (7th Cir. 1996) (applying *Copperweld* to NBA broadcast rights). *But see North American Soccer League v. NFL*, 670 F.2d 1249, 1257 (C.A.N.Y. 1982) (rejecting single entity exemption status for professional sports leagues); *NHLPA v. Plymouth Whalers*, 419 F.3d 462, 469 (6th Cir. 2005) (finding hockey league to be multiple actors and not single entity, since existence was only constituted by twenty member teams).

44. *See id.* (describing standards of review).

45. *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 104 (1984).

46. *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

47. *See id.* (prescribing when per se rule appropriate).

48. *See* 54 AM. JUR. 2d *Monopolies and Restraints of Trade* § 51 (2008) (describing practical rationale for finding per se illegality).

49. *See Pelnar, supra* note 42, at 41 (providing examples of per se illegal restraints on trade); *see also Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 677 (7th Cir. 1992) (recognizing possibly illegal restraints in NBA).

50. *See Bd. of Regents*, 468 U.S. at 105 (defining “unreasonable” restraint under Rule of Reason). A determination of a restraint as unreasonable may be based

sis is an appropriate standard of review where an agreement between members of a joint venture has both legitimate purposes as well as anticompetitive effects.<sup>51</sup> Rule of Reason entails an inquiry into whether the challenged agreement is one that encourages or suppresses competition, balancing the procompetitive effects of a restraint against any anticompetitive effects.<sup>52</sup> In general, courts have consistently analyzed challenged conduct under the Rule of Reason when dealing with sports leagues, an area of industry in which some horizontal restraints are necessary for the availability of the product.<sup>53</sup>

A starting point in a Rule of Reason inquiry is identification of the relevant market, the group of products or services with which and geographic areas within which the defendant's products effectively compete and will be restrained.<sup>54</sup> Distinguishing the proper market is necessary to "identify[ ] competitive conditions within the industry, contrast[ ] the market positions of the defendants with those of their competitors, and gaug[e] the likely competitive impact of the challenged restraint."<sup>55</sup>

A Rule of Reason approach places the initial burden on the plaintiff to show that an agreement created a substantially adverse effect on competition.<sup>56</sup> If this burden is met, the defendant must then come forward with evidence of procompetitive virtues that off-

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either on: (1) the nature or character of the contracts; or (2) surrounding circumstances giving rise to an inference or presumption that they were intended to restrain trade and enhance prices. *See id.* Rule of Reason analysis is the standard traditionally applied to the majority of anticompetitive practices challenged under the Sherman Act. *See Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977).

51. *See NASL v. NFL*, 670 F.2d 1249, 1259 (2nd Cir. 1982) (outlining how Rule of Reason analysis differs from per se illegality).

52. *See id.* (explaining that procompetitive justifications must outweigh adverse effects).

53. *See NHLPA v. Plymouth Whalers*, 419 F.3d 462, 469 (6th Cir. 2005) (listing precedent for applying Rule of Reasons to sports entities).

54. *See* William C. Holmes, ANTITRUST LAW HANDBOOK § 2:10 (2007) (defining relevant market). "Since market power is a prerequisite to being able to restrain trade unreasonably the first issue in establishing a violation of the rule of reason is the determination as to whether the defendant possesses market power in the relevant market where the alleged anticompetitive activity occurs." 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 49 (2008). "Market power" is defined as "the ability of a firm . . . to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded." Pelnar, *supra* note 43, at 43.

55. William C. Holmes, ANTITRUST LAW HANDBOOK § 2:10 (2007).

56. *See Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) (outlining shifting burdens of proof in Rule of Reason analysis).

set the alleged wrongful conduct.<sup>57</sup> If the defendant demonstrates procompetitive effects, the plaintiff bears the responsibility of showing that the conduct is not reasonably necessary to achieve the legitimate objectives or that they may be achieved in a substantially less restrictive manner.<sup>58</sup> Once these steps are met, the harms and benefits are weighed against each other to determine whether the behavior, on balance, was reasonable.<sup>59</sup>

Furthermore, an abbreviated version of the Rule of Reason technique has also emerged, known as the “quick look” analysis. A quick look standard differs from the Rule of Reason approach in that it entails only a simplified market analysis to establish a prima facie case, relieving the plaintiff of having to rigorously prove the relevant market, defendant’s market power, and anticompetitive effects.<sup>60</sup> Rather, the adverse anticompetitive effects must simply be intuitively obvious.<sup>61</sup> Some courts, however, still require that the “rough contours” of an allegedly affected market must also be sufficiently distinguished and obvious to judge the likely competitive impact of the defendant’s conduct.<sup>62</sup> In either case, the quick look doctrine preserves the per se rule’s presumption of likely competitive harm as a basis for plaintiff’s prima facie case unless and until defendants demonstrate a procompetitive business justification.<sup>63</sup>

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57. See *id.* at 1020 (explaining defense of legitimate rationales for challenged restraints).

58. See *id.* at 1019 (putting burden back on plaintiff when procompetitive efficiencies shown).

59. See *id.* (concluding test with balancing of interests).

60. See *Metro. Intercollegiate Basketball Ass’n v. NCAA*, 337 F.Supp. 2d 563, 573 (S.D.N.Y. 2004) (contrasting Rule of Reason and quick look based on varying burdens of proof).

61. See *Madison Square Garden, L.P. v. NHL*, No. 07 CV 8455 (LAP), 2007 WL 3254421 at \*6 (S.D.N.Y. Nov. 2, 2007) (defining quick look standard).

62. See *Holmes*, *supra* note 53 (commenting on slightly more stringent burden of proof in some courts under quick look).

63. See *The Truncated or “Quick Look” Rule of Reason*, June 25, 2007, <http://www.ftc.gov/opp/jointvent/3Persepap.shtm>. The quick look analysis is distinguishable from both per se illegality and Rule of Reason analysis in that:

To the extent that the cases otherwise would have received *per se* treatment, truncation refines modern trends in per se analysis by requiring a closer examination of the proffered justifications. To the extent that the cases otherwise would have been evaluated under the rule of reason, truncation lightens plaintiff’s burden through a willingness to find competitive harm in the very nature of the restraint, just as the *per se* rule presumes that certain conduct entails adverse effects.

*Id.*

### III. THROWING SHORT JABS: NARRATIVE ANALYSIS OF PRELIMINARY MOTION

#### A. *Madison Square Garden, L.P. v. NHL*

##### 1. *Rejecting the Quick Look Approach*

The district court quickly dismissed MSG's initial argument that a quick look analysis was the applicable standard of review, emphasizing that quick look, or truncated Rule of Reason, is only appropriate when anticompetitive effects are obvious, and "an observer with even a rudimentary understanding of economics 'could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'"<sup>64</sup> The NHL's New Media Strategy did not constitute a "naked restraint" because it had plainly evident legitimate procompetitive virtues, making the quick look doctrine inapplicable.<sup>65</sup> The court recognized that the use of a common technology platform would enable the league to further its growth strategy of enhancing the NHL's national brand to compete with other professional sports and entertainment products and their websites.<sup>66</sup> Increased online scale and a standardized layout would help attract national sponsors and advertisers and enable them to reduce transactions costs, since negotiations would take place entirely with the league.<sup>67</sup> In addition, the New Media Strategy was intended to "assure minimum quality standards across team websites; increase the interconnectivity across the NHL.com network; facilitate the sharing of team content; and reduce the costs of operating thirty 'back office' website operations, among other reasons."<sup>68</sup>

The court also found MSG's comparison with *NCAA v. Board of Regents of University of Oklahoma*, in which the NCAA violated anti-trust laws through its plan for limiting television coverage of college football games, to be misplaced.<sup>69</sup> Unlike *NCAA*, in which price fix-

64. See *Madison Square Garden*, 2007 WL 3254421, at \*6 (defining quick look standard of observer with "rudimentary understanding").

65. See *id.* (concluding New Media Strategy not "blatantly anticompetitive" and "far from obvious" that it lacked procompetitive justifications).

66. See *id.* (recognizing that central website would facilitate traffic amongst fans on nhl.com). As NHL Deputy Commissioner Bill Daly stated, "The more we can translate the passion of fans for their local teams into League-wide support, and the more fans we can get to follow the NHL playoffs and the Stanley Cup Final . . . the more value we can generate for the NHL . . ." *Id.* at \*1.

67. See *id.* at \*6 (calling New Media Strategy "obvious advantage [ ] of one-stop exploitation of the intellectual properties of the [thirty] teams").

68. *Id.* (listing specific procompetitive efficiencies).

69. See *id.* at \*7 (rejecting that NHL New Media Strategy imposes naked restraint on price and output like television coverage plan in *NCAA*).

ing of particular telecasts, exclusive contracts amounting to group boycott of potential competitors and artificial limitations on the production of televised football coverage harmed consumers, no evidence existed to show that hockey fans would similarly receive no benefit from the NHL's chosen measures.<sup>70</sup> Rather, the NHL's consumers preferred the websites under the New Media Strategy to those operated by individual clubs.<sup>71</sup>

Also, the court in *NCAA* found no procompetitive efficiencies, noting that college football could have been marketed just as effectively without the challenged television plan.<sup>72</sup> The NHL, on the other hand, created a centralized management system as an integral part of its strategy to promote a league brand and "perpetuat[e] hockey as one of the national games of the United States and Canada . . . ."<sup>73</sup>

Finally, the district court rejected MSG's assertion that a sports joint venture may only impose internal restraints that are necessary for the product to be available at all because the "necessary standard" was used in *NCAA* to explain why per se analysis was inappropriate.<sup>74</sup> The court also believed that it would be inconsistent with prior case law that has generally upheld agreements among parents of a joint venture to not compete with the joint venture in the market in which it operates.<sup>75</sup>

## 2. *Finding that MSG Failed to Sustain its Burden Under Rule of Reason Analysis*

The district court additionally concluded that MSG failed to carry its burden of establishing a prima facie case of anticompetitive restraint under a Rule of Reason standard.<sup>76</sup> Foremost, though MSG identified several potential relevant markets in its complaint,

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70. See *Madison Square Garden*, 2007 WL 3254421, at \*7 (distinguishing NHL New Media Strategy by suggesting strategy provides public benefit).

71. See *id.* (noting record showed fans' preference for centralized website control).

72. See *id.* (explaining that NCAA television plan did not enhance competitiveness of college television football rights).

73. See *id.* (finding NHL's plan reasonable first step toward improving "purpose and object" for which league is organized).

74. *Id.* (stating that restraints need not only be "necessary" for joint venture to function at all).

75. See *id.* ("Agreements among the parents not to compete with the joint venture in the market in which the joint venture operates generally have been upheld as reasonable ancillary restraints.") (quoting 1 ABA Section of Antitrust Law, *Antitrust Law Developments* 470 (6th ed. 2007)).

76. See *Madison Square Garden*, 2007 WL 3254421, at \*8 (concluding that MSG failed to demonstrate adverse effect on relevant market or market power).

it provided no evidence “defining *the* relevant market,” which must first be delineated in order to illustrate an actual adverse effect on competition.<sup>77</sup> Further, MSG’s two reply expert declarations only asserted that: (1) a centralized league website would reduce competition in the New York metropolitan area; (2) the league could not market itself better on a collective basis than on an individual team basis; and, (3) a team website was an invaluable marketing tool for the Rangers brand.<sup>78</sup> These assertions, however, were not enough to establish that the NHL’s actions created an actual adverse effect on competition in the relevant market or market power.<sup>79</sup> Moreover, MSG incorrectly focused on the harm that the NHL’s New Media Strategy potentially posed on its own ability to cross-market its various other products on the newyorkrangers.com website.<sup>80</sup> The court distinguished that antitrust laws were enacted for the protection of *competition*, not individual competitors.<sup>81</sup>

Finally, even if MSG had shown that the NHL created an anticompetitive restraint, the NHL met its burden of providing offsetting procompetitive benefits.<sup>82</sup> By centralizing the teams’ websites and preventing the Rangers from operating a rival site, the league promoted uniformity, facilitated fan navigation, attracted advertisers, reduced transactions costs in advertisement negotiations and prevented individual clubs from “free-riding” off of the league’s efforts.<sup>83</sup> As a result, MSG was unsuccessful in demonstrating a likelihood of success on the merits.<sup>84</sup>

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77. *Id.* (emphasizing prerequisite of proving adverse effect is defining market).

78. *See id.* (attacking MSG’s expert declarations).

79. *See id.* (concluding that moving newyorkrangers.com to CMS not sufficient enough to constitute an adverse effect). Rather, “output” is not merely a quantitative assessment but also involves a qualitative, market-based judgment. *Id.*

80. *See id.* (explaining MSG’s allegation of harm that common website template could cause to its promotion of other MSG offerings).

81. *See id.* (distinguishing that antitrust laws based on protecting competition in market, not merely one competitor from another).

82. *See Madison Square Garden*, 2007 WL 3254421, at \*9 (finding procompetitive justification satisfied, shifting burden to MSG to prove challenged restraint not reasonably necessary).

83. *Id.* (listing NHL’s stated benefits of New Media Strategy). “This finding is bolstered by the fact that MSG has shown no harm whatsoever to *consumers*, especially in light of the facts that the team maintains control over most of the content of the new website and fans can still get access directly to the Rangers site through newyorkrangers.com.” *Id.*

84. *See id.* (denying request for preliminary injunction).

#### IV. CONNECTING WITH AN UPPERCUT: CRITICAL ANALYSIS OF THE MSG CLAIM

##### A. The MSG Court Correctly Dismissed a Quick Look Analysis

The district court was justified in concluding that the quick look technique was not an appropriate standard for reviewing the NHL's New Media Strategy.<sup>85</sup> Pursuant to antitrust doctrine, a plaintiff is required to show that its loss resulted from acts that reduced output or raised prices to consumers and were obvious to an observer with a rudimentary understanding of economics.<sup>86</sup> In other words, plaintiff's prima facie burden may be satisfied by a presumption of competitive harm from the very nature of the challenged conduct.<sup>87</sup> Even such naked restraints, however, may be legal if offset by specific procompetitive justifications.<sup>88</sup> Accordingly, not only does the arrangement made by the NHL not obviously impose an anticompetitive effect on customers or markets through output restrictions, but it also provides several procompetitive virtues.<sup>89</sup>

##### 1. *Quick Look Analysis in NCAA v. Board of Regents of the University of Oklahoma*

In *NCAA*, the Supreme Court concluded that it was obvious that the NCAA's plan limiting live television broadcasts created a horizontal restraint on the ability of member institutions to compete because under the agreement, universities could not compete against each other on the basis of price or kind of television rights that could be offered to broadcasters.<sup>90</sup> The plan placed a ceiling on the number of games that institutions could televise, artificially

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85. For a further discussion of the district court decision, see *infra* notes 104-32 (analyzing decision based on precedential case law).

86. See *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 669 (7th Cir. 1992) (stating that unreasonable restraint must affect output or price); see also *Madison Square Garden*, 2007 WL 3254421, at \*6 (explaining quick look standard).

87. See *The Truncated or "Quick Look" Rule of Reason*, *supra* note 63 (defining plaintiff's burden of proof under "quick look").

88. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99-100 (1984) (finding NCAA college football television plan constituted "naked restraint" on price and output).

89. See *Madison Square Garden*, 2007 WL 3254421, at \*9 (finding several justifications that prevented New Media Strategy from being "naked restraint," including uniformity and decreased transaction costs).

90. See *NCAA*, 468 U.S. at 99 ("[T]he NCAA member institutions have created a horizontal restraint – an agreement among competitors on the way in which they will compete with one another.").

limiting the quantity of televised football available.<sup>91</sup> In addition, the “minimum aggregate compensation” paid to the participating institutions operated to preclude any negotiation of price with broadcasters, thereby imposing a means of horizontal price fixing.<sup>92</sup>

Finding naked restraints, the Court required the NCAA to present some competitive justifications.<sup>93</sup> The Court also rejected the NCAA’s proffered justifications, including marketing efficiency and enhanced competitive balance.<sup>94</sup> Principally, NCAA football could be marketed just as effectively without the plan.<sup>95</sup> In addition, though the Court acknowledged that a certain degree of cooperation is necessary to foster and preserve competition among amateur athletic teams to enhance public interest, the specific restraints on telecasts failed to “fit into the same mold as” truly equalizing rules, such as those defining conditions of the contest, eligibility, or responsibilities and benefits of those participating in the joint venture.<sup>96</sup> The television plan was not related to any readily identifiable group of competitors nor did it present any evidence of

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91. *See id.* at 99-100 (concluding minimum aggregate price for broadcast rights constituted price fixing). “Ensuring that individual members of a joint venture are free to increase output has been viewed as central in evaluating the competitive character of joint ventures.” *Id.* at 114 n.54.

92. *Id.* at 114-15 (“Here production has been limited, not enhanced. No individual school is free to televise its own games without restraint.”). The Court stated:

[T]he amount that any team receives does not change with the size of the viewing audience, the number of markets in which the game is telecast, or the particular characteristic of the game or the participating teams. Instead, the “ground rules” provide that the carrying networks make alternate selections of those games they wish to televise, and thereby obtain the exclusive right to submit a bid at an essentially fixed price to the institutions involved.

*Id.* at 93.

93. *See id.* at 109 (“This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.”). “Both lower courts found not only that NCAA has power over the market for intercollegiate sports, but also that in the market for television programming – no matter how broadly or narrowly the market is defined – the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing.” *Id.* at 110.

94. *See id.* at 113-15, 117-20 (finding plan’s controls did not serve any legitimate procompetitive purpose).

95. *See id.* at 114 (concluding no marketing efficiencies existed).

96. *Id.* at 117, 119 (“[T]he NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than is the television plan . . .”). “There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity.” *Id.*



an "intent to equalize the strength of teams in Division I-A with those in Division II or Division III [or] even a colorable basis for giving colleges that have no football program at all a voice in the management of the revenues generated by the football programs at other schools."<sup>97</sup>

## 2. *Finding Naked Restraint in Chicago Professional Sports Ltd. Partnership v. NBA*

Similarly, in *Chicago Professional Sports Ltd. Partnership v. NBA* the Seventh Circuit held that an NBA rule prohibiting television superstations from carrying more than twenty games per season or telecasting games in competition with Turner Network Television ("TNT") constituted an unreasonable restraint on output.<sup>98</sup> Owners had agreed that only networks that gained league authority could nationally telecast, despite the objections of the Chicago Bulls and their local station, WGN.<sup>99</sup>

The court stated that agreements limiting to whom and how much a firm may sell its product are the defining characteristics of illegal cartels.<sup>100</sup> The NBA's plan constituted a restriction on output by definition because it capped the number of games which could be televised, regardless of whether more persons watched fewer, more attractive games.<sup>101</sup> Furthermore, the limitation on the volume of telecasting lacked any explanation connecting the practice to consumer benefits.<sup>102</sup>

Though the NBA attempted to justify the telecasting rule by alleging that it prevented clubs from "misappropriating" the property right of the league to exploit its symbols and success, the NBA

97. *Id.* at 118-19 "The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others." *Id.*

98. *See Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 677 (7th Cir. 1992) [hereinafter *Bulls I*] (finding no reason to overturn district court judgment). The NBA sold telecasting rights to both the National Broadcasting Company and Turner Network Television, granting the right to broadcast 26 and 50 regular-season games, respectively. *See id.* at 669. Each club could telecast 41 games per season to their home markets and air the other 41 on local cable, keeping the proceeds. *See id.*

99. *See id.* at 669 (noting ownership agreement to NBA broadcasting plan).

100. *See id.* at 674 ("Agreements limiting to whom, and how much, a firm may sell are the defining characteristics of cartels and may not be invoked as justifications of a cutback in output.").

101. *See id.* at 673 (finding prima facie evidence of reduction in output).

102. *See id.* at 674 ("[A]ny agreement to reduce output measured by the number of televised games requires some justification – some explanation connecting the practice to consumers' benefits – before the court attempts an analysis of market power."). "Unless there are sound justifications, the court condemns the practice without ado . . . ." *Id.*

teams still retained the intellectual property rights in their games through the NBA articles and bylaws, and the league had not acquired any property interest in the telecasts.<sup>103</sup> Thus, the league was merely shortening the list of stations to which clubs could sell rights that it possessed.<sup>104</sup> Moreover, even if the league did possess such rights, its control over intellectual property to prevent misappropriation still failed to provide a benefit to the consumer welfare.<sup>105</sup>

#### 4. *Application of Case Law to MSG v. NHL*

##### a. Rejecting the Claim of Naked Restraint

In contrast to both NCAA and *Bulls I*, the NHL's New Media Strategy did not, on its face, present any apparent anticompetitive consequences.<sup>106</sup> Unlike the NCAA plan, which hindered institutions' ability to compete and deviated from a free market model by preventing negotiable television agreements and the amount of games televised, and the NBA agreement, which restricted the number of telecasts, the NHL allowed the Rangers to retain some control over local stories, information and other content, as well as thirty-five percent of advertising on its website.<sup>107</sup> In addition, the league permitted the continued and coextensive use of the newyorkrangers.com domain with its own ranger.nhl.com domain.<sup>108</sup> Moreover, the NHL, in its private meetings with the Rangers, agreed to construct a section of the ranger.nhl.com website about the team's history, refrain from posting stories about local rivals the New York Islanders and New Jersey Devils on the homepage and move local advertising to a more prominent position on the site.<sup>109</sup>

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103. *Id.* (describing attempted justification made by NBA for restraining output and price with regard to telecasts).

104. *See id.* at 674 ("A cartel could not insulate its agreement from the Sherman Act by giving certain producers contractual rights to sell to specified customers.").

105. *See id.* (explaining that procompetitive justification is based on effects of television policy on consumers' welfare, not whether NBA held contractual property rights).

106. *See* *Madison Square Garden, L.P. v. NHL*, No. 07 CV 8455(LAP), 2007 WL 3254421, at \*7 (S.D.N.Y. Nov. 2, 2007) (contrasting restraints in NCAA with those alleged by MSG).

107. *See id.* at \*2, \*5 n.5 ("It is also undisputed that, under the New Media Strategy, the Rangers will retain the responsibility and opportunity for populating its website with local stories and information about local players and games . . .").

108. *See id.* (adding that NHL did not force discontinuation of newyorkrangers.com domain).

109. *See id.* at \*4 (stressing aspects in which Rangers retained control over its website).

In short, such practices were not of the type “ordinarily condemned as a matter of law under an ‘illegal per se’ approach because the probability that these practices are anticompetitive is so high,”<sup>110</sup> as MSG still played a significant role in dictating its output.<sup>111</sup>

b. Assessing Procompetitive Justifications of the NHL Common Platform

Even if the restraint created by the NHL Strategy initially decreased output, as long as it “in the end expands output” and “serves the interests of consumers,” it would still constitute a valid plan under a quick look analysis.<sup>112</sup> Accordingly, the New Media Strategy is designed to increase production and remains responsive to consumer demand and preference.<sup>113</sup> Whereas the NCAA broadcast offering kept viewers from watching games for which there was a large viewer interest, choosing instead to air games for which little or no demand existed,<sup>114</sup> the NHL insisted on the operation of a single CMS to enhance the quality and popularity of clubs’ individual websites in furtherance of a league brand, allowing for it to “compete for the good-will of fans and . . . optimize the monetization of internet sponsorship and advertising opportuni-

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110. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984) “[A] per se rule is applied when ‘the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.’” *Id.*; see also *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (“Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused.”). The Supreme Court in *Copperweld* continued:

Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm’s efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination’s actual effect.

*Id.*

111. See *Madison Square Garden*, 2007 WL 3254421, at \*9 (finding no restraint in output where team retains control over website).

112. *Chicago Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 673 (7th Cir. 1992) (“A ‘restraint’ that in the end expands output serves the interests of consumers and should be applauded rather than condemned.”).

113. See *Madison Square Garden*, 2007 WL 3254421, at \*7 (“[T]he only evidence in the record suggests that fans prefer the websites under the New Media Strategy over the old.”).

114. See *NCAA*, 468 U.S. at 107 n.34 (“Perhaps the most pernicious aspect is that under the controls, the market is not responsive to viewer preference.”). “[C]onsumers, the viewers of college football television, receive absolutely no benefit from the controls. Many games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised.” *Id.*

ties.”<sup>115</sup> Likewise, centralization permits the NHL, through scale economies, to respond to consumer demand more efficiently and effectively.<sup>116</sup> As a result, the NHL platform creates “best of breed” features, accommodating teams’ specific needs within the framework of the common platform and template to both monetize local advertising and sponsorship revenue while attracting fans through an attractive and user-friendly experience.<sup>117</sup>

An action by a league that initially reduces output may also be justified because it serves to promote rivalry for a more attractive product, which, in turn, draws a larger audience.<sup>118</sup> For instance, in *Bulls I*, the court stated that a rule keeping some popular games off superstations could help weaker teams attract the support of their local markets by encouraging in-person attendance.<sup>119</sup> By promoting exciting and competitive games, small market teams could sustain gate revenue to finance their operations and therefore be able to better compete with larger market clubs.<sup>120</sup>

Similarly, by enacting the CMS, the NHL develops fans’ enthusiasm and interest in other teams.<sup>121</sup> The NHL found that most hockey fans were “tribal” and “team-centric,” as viewership of nationally televised games depended largely on whether the consumer’s favorite team was playing.<sup>122</sup> Through centralization of

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115. Declaration of Ted Leonsis at ¶ 5, *Madison Square Garden, L.P. v. NHL*, 2007 WL 3254421 (S.D.N.Y. Nov. 2, 2007) (No. 07 CIV. 8455 (LAP)).

116. See Declaration of Franklin M. Fisher at ¶ 62, *Madison Square Garden, L.P. v. NHL*, 2007 WL 3254421 (No. 07-CIV-8455 (LAP)) (discussing how unified media strategy develops national brand and allows NHL to respond more efficiently to consumers).

117. Declaration of Ted Leonsis, *supra* note 115, at ¶ 150 (explaining how New Media Strategy benefits through both common template and accommodating teams’ individual needs).

118. See *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 673 (7th Cir. 1992) (“Rivalry makes for a more attractive product, which then attracts a larger audience – the very expansion of output that the antitrust laws foster.”); see also *NCAA*, 468 U.S. at 118 (rejecting competitive balance as justification because no single league or tournament existed in which all college football teams compete; therefore, there was no true competition to equalize).

119. See *Chicago Prof'l Sports Ltd. P'ship*, 961 F.2d at 673 (explaining possibility by which initial restriction on output could later increase output).

120. See *id.* (describing restriction that serves to maintain competitive balance).

121. See *Madison Square Garden, L.P. v. NHL*, No. 07 CV 8455 (LAP), 2007 WL 3254421, at \*1 (S.D.N.Y. Nov. 2, 2007) (stating centralized platform’s goal was that it helps draw fan interest to other teams in largely “team-centric” league). “One problem that the NHL has had is bridging fan support for local teams with interest in the sport as a whole. Hockey fans . . . are less likely to watch the playoffs once ‘their team’ is eliminated than are fans of other sports.” *Id.*

122. Declaration of Franklin M. Fisher, *supra* note 116, at ¶ 61 (“[Hockey fans] tend to be fans of their local or favorite team more so than fans of the

teams' websites to create a league-wide experience, small market clubs could generate incremental revenue from national sponsors and advertisers which they could not attract on their own, as well as a more expansive interest in their teams and star players, resultingly improving their ability to compete against large market teams and broadening their fan base.<sup>123</sup>

Furthermore, the New Media Strategy acts as an effective enforcement mechanism to deter "free-riding."<sup>124</sup> In *Bulls I*, the Seventh Circuit recognized that teams that take advantage of costly league efforts, without paying for them, reduce the payoff for clubs making an investment into that venture.<sup>125</sup> Consequently, such investments in design and distribution of league products become less attractive, to the ultimate detriment of consumers.<sup>126</sup> As a result, the court recognized control of free-riding as an accepted justification for cooperation.<sup>127</sup> Similarly, if the Rangers or another NHL team failed to abide by the common platform strategy, it would profit from the willingness of other teams that promote the NHL at the expense of surrendering some of its individual autonomy over website design and corresponding intellectual property rights, while bearing none of the costs of surrendering this autonomy.<sup>128</sup>

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sport.") "Because hockey fans' viewership of nationally televised games depends heavily on whether their favorite team is playing, the value of national television contracts is diminished. Among the four major sports, the NHL has the smallest increase in TV ratings from the regular season to the playoffs . . . ." *Id.*

123. See Declaration of Ken Sawyer at ¶ 4-5, Madison Square Garden, L.P. v. NHL, 2007 WL 3254421 (No. 07 CIV. 8455 (LAP)) ("[T]he NHL.com platform will allow the [Pittsburgh] Penguins to reach out to and communicate more effectively with a national and international audience, and we expect that it will help us build a broader fan base.").

124. Declaration of Franklin M. Fisher, *supra* note 116, at ¶ 17 ("Free-riding would lead to inefficient outcomes because the League, its member teams, or its players would not have the appropriate incentive to invest in the promotion and development of the product if an individual team alone were allowed disproportionately to capture the benefits from those efforts.").

125. See *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 674-75 (7th Cir. 1992) (describing detriments of free-riding).

126. See *id.* (stressing ultimate harm to consumers).

127. See *id.* ("Control of free-riding is accordingly an accepted justification for cooperation."). "Free-riding is the diversion of value from a business rival's efforts without payment." *Id.* at 675.

128. See Declaration of Franklin M. Fisher, *supra* note 116, at ¶ 31-33 (discussing how allowing teams "free rein to exploit NHL intellectual property" would lead to free-riding on efforts of collective league action).

The NHL New Media Strategy is also justifiable because it promotes “interbrand” competition.<sup>129</sup> The Supreme Court in *NCAA* held that the NCAA plan, enabling the association to penetrate the market through an attractive package sale, was a “unique product for which there [was] no ready substitute.”<sup>130</sup> Since college football had no competitors, no need existed for collective action.<sup>131</sup> However, the Court left open the possibility that such a restraint could be appropriate for a venture to enhance its ability to compete if faced with interbrand competition from available substitutes.<sup>132</sup>

Conversely, the NHL New Media Strategy represents such an intrabrand strategy that fosters interbrand competition through: increased online scale, standardized layouts and interconnectivity; sharing of team content; and reduction of transaction costs that allow the NHL to better compete against other providers of sports and entertainment products and their respective websites.<sup>133</sup> As explained by Washington Capitals’ owner and AOL executive Ted Leonsis, the NHL centralized platform allows the league to compete for fans’ time and disposable income against both other professional sports organizations and “dot.com entities,” since “[c]onsumers . . . have become more computer savvy and expect their entertainment when they want, where they want and how they want.”<sup>134</sup>

#### B. The District Court Appropriately Concluded that MSG Failed to Sustain its Burden of Proof Under a Rule of Reason Analysis

Under the Rule of Reason analysis, a determination of the reasonableness of a particular restraint—whether the restraint imposed is one that merely regulates and promotes competition or, alternatively, suppresses or destroys competition—requires a case-by-case application with the fact-finder taking all circumstances into consideration to balance the business arrangement’s positive and

129. See *Madison Square Garden, L.P. v. NHL*, No. 07 CV 8455(LAP), 2007 WL 3254421, at \*7 (S.D.N.Y. Nov. 2, 2007) (finding “interbrand” competition sufficient justification for restraint).

130. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 115 (1984).

131. See *id.* at 131 (“There is no need for collective action to enable a product to compete against nonexistent competitors.”).

132. See *id.* at 115 n.55 (“If the NCAA faced ‘interbrand’ competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete.”).

133. See generally *Madison Square Garden*, 2007 WL 3254421 (listing numerous procompetitive justifications of NHL platform).

134. Declaration of Ted Leonsis, *supra* note 115, at ¶ 10 (“The internet’s ability to interface with wireless technology is clearly the source of future revenue growth for all professional sports.”).

negative effects on competition in the relative market.<sup>135</sup> To establish a violation under the Rule of Reason, a claimant must prove that: (1) a relevant market was affected by the challenged restraint; (2) the defendant possessed market power within that market; (3) anticompetitive effects existed in the intrabrand or interbrand market; and, (4) the negative effects on competition were not outweighed by the positive effects on competition.<sup>136</sup>

### 1. *Defining the Relevant Market*

The “relevant market” under the Rule of Reason standard is the particular group of products or services with which the defendant’s product effectively competes within a specified geographic area.<sup>137</sup> Such products or services “‘are reasonably interchangeable with, as well as identical to, the defendant’s product’ affected by the rule or regulation being challenged.”<sup>138</sup> Identification of the market is necessary as an initial step to identify competitive conditions within that industry, contrast the market positions of competitors, and gauge the competitive impact of the alleged restraint.<sup>139</sup> For instance, in *NCAA*, the market was defined as “live college football television,” since alternative programming had a significantly different audience appeal.<sup>140</sup> By defining the market in this way, the

135. See 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 48 (2008) (listing factors used in balancing); see also *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (describing balancing under Rule of Reason standard). The analysis includes an ascertainment of facts peculiar to the particular business, including: (1) the condition of the enterprise before and after the restraint was imposed; (2) the probable or actual effect of the restraint; (3) the history of the restraint; (4) the reason for adopting the restraint; and, (5) the purpose sought to be attained by the restraint. See *id.*

136. See 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 48 (2008) (citing *Spanish Broad. Sys., Inc. v. Clear Channel Commc’ns, Inc.*, 242 F. Supp. 2d 1350 (S.D. Fla. 2003)) (setting out elements needed to sustain Rule of Reason claim). Adverse economic effects are based on the percentage of the business controlled by the venture and the strength of remaining competition. See 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 49 (2008).

137. See William Meade Fletcher, *Federal Antitrust Law – Rule of Reason*, 10A Fletcher Cyc. Corp. § 4982 (2007) (“The term ‘relevant market’ encompasses notions of geography as well as product use, quality and description.”). “A geographic market extends to the area of effective competition where buyers can turn for alternative sources of supply.” *Id.*

138. *NHLPA v. Plymouth Whalers*, 419 F.3d 462, 471 (6th Cir. 2005) (citing *Am. Council of Certified Podiatric Physicians and Surgeons v. Am. Bd. Of Podiatric Surgery, Inc.*, 185 F.3d 606, 622 (6th Cir. 1999)).

139. See Holmes, *supra* note 54 (stressing importance of identifying relevant market).

140. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 95 (1984) (reaffirming district court definition of relevant market as “live college football television”).

Court delineated the NCAA's restraint of competition as: fixing the prices for telecasts, threatening sanctions on member schools and placing artificial limits on the number of televised games with no regard to consumer demand.<sup>141</sup> In the subject dispute, the relevant market can best be described as web-based competition between the NHL and other sports entertainment providers.<sup>142</sup>

## 2. *The NHL Lacks Market Power in the Relevant Market*

The first step in establishing a violation under the Rule of Reason analysis is to assess whether the defendant possesses market power in the relevant market in which the alleged anticompetitive activity occurs.<sup>143</sup> Market power is defined as the capacity of an enterprise to restrict output and increase prices above those that would be charged in a competitive market, or, similarly, the ability to control price or exclude competition.<sup>144</sup> For instance, in *NCAA*, the Supreme Court emphasized that the NCAA possessed market power over college football telecasts because telecasts generated an "audience uniquely attractive to advertisers" and competitors were unable to offer analogous programming to attract a comparable audience.<sup>145</sup> Advertisers were willing to pay a premium price per viewer to broadcast during college football because of their demographic characteristics.<sup>146</sup>

In contrast, in *Bulls I*, the Seventh Circuit viewed market power more expansively, comparing the NBA product not only to sports broadcasts but to all entertainment on television to conclude that the league's programming only attracted a small fraction of view-

141. See *id.* (reciting restraints in that market).

142. See *Madison Square Garden, L.P. v. NHL*, No. 07 CV 8455(LAP), 2007 WL 3254421, at \*6 (S.D.N.Y. Nov. 2, 2007) (identifying NHL and other sports entertainment providers as relevant market).

143. See *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 673 (7th Cir. 1992) (quoting *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 191 (7th Cir. 1985) ("[T]he first step in any Rule of Reason case is an assessment of market power"). "Because a violation of the rule of reason is not ordinarily established merely by showing that the plaintiff's business has been injured or that a single competitor has been removed from the relevant product market, the issue as to whether a firm possesses market power may facilitate the determination." 54 AM. JUR. 2d *Monopolies and Restraints of Trade* § 49 (2008).

144. See *NCAA*, 468 U.S. at 109 n.38 (defining market power); see also *Holmes*, *supra* note 53 ("Market power is variously defined as the 'ability to control price or exclude competition' or as the power to 'raise prices and restrict output.'").

145. See *NCAA*, 468 U.S. at 112 (finding NCAA possessed market power with respect to college football broadcasts because no alternative programming existed).

146. See *id.* at 111 (noting NCAA football's market power based on its unique demographic characteristics).



ers.<sup>147</sup> Because of the relatively trivial magnitude of viewership, NBA national broadcasts could not be considered as having “uniquely attractive” qualities to advertisers.<sup>148</sup> Additionally, even if the NBA did sustain unique viewers, advertisers could reach such audiences through other sports and entertainment programs, such as advertisements for basketball games during sitcoms and other programs, implying that the league’s viewer market “extend[ed] well beyond weekend sports programming.”<sup>149</sup> Furthermore, advertisers paid no more for commercials during NBA games than any other sports and substantially less than other forms of entertainment; as a result, “higher prices, the hallmark of a reduction in output, [were] missing.”<sup>150</sup>

Similarly, the NHL does not possess market power in the broad entertainment and advertising markets in which it competes.<sup>151</sup> Even assuming that the market for web-based competition involves just professional leagues and sports media entities, the NHL.com website would still only account for three percent of “unique visitor” traffic among the top twenty sports websites.<sup>152</sup> In fact, it ranked as only the twelfth most-visited sports website in April 2007 according to one Internet traffic source, even though the NHL was beginning the Stanley Cup playoffs.<sup>153</sup> The NHL’s lack of market power is further confirmed by its television ratings for the Stanley

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147. See *Chicago Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 673 (7th Cir. 1992) (suggesting NBA had little market power because it was viewed only by relatively small portion of consumers).

148. See *id.* (rejecting “uniquely attractive to advertisers” standard because of minor audience in comparison to other entertainment programs).

149. See *id.* (explaining that advertisers could reach same demographic without having to advertise during NBA games).

150. See *id.* (comparing advertisers’ payment for NBA commercials against other entertainment entities). “During 1990 the cost per thousand viewers (CPM) of a regular-season NBA network game was \$8.17. NCAA football fetched \$11.50, and viewers of prime-time programs were substantially more expensive. The CPM for *L.A. Law* was \$19.34, the CPM for *Coach* \$13.40.” *Id.*

151. See *Madison Square Garden, L.P. v. NHL*, No. 07 CV 8455(LAP), 2007 WL 3254421, at \*8 (S.D.N.Y. Nov. 2, 2007) (concluding NHL lacks market power in sports website market).

152. Declaration of Franklin M. Fisher, *supra* note 116, at ¶ 54 (quantifying NHL market power through Internet traffic to NHL.com).

153. See *id.* (citing online sports networks more popular than NHL.com). These sites included:

ESPN.com (more than six times the number of U.S. visitors), FOX Sports on MSN (more than five times the number of U.S. visitors), MLB.com (more than four times the number of U.S. visitors), NFL.com (nearly three times the number of U.S. visitors), CSTV.com (more than one and a half times as many U.S. visitors) and CBS Sportsline (also more than one and a half times as many U.S. visitors).

*Id.*

Cup Finals, which roughly correlate with the popularity of the products supplied by other sports leagues.<sup>154</sup> According to Nielsen ratings data, the Finals attracted a far smaller television audience than the championships of MLB, the NBA, and the NFL.<sup>155</sup>

### 3. *NHL New Media Strategy Does Not Harm Competition in the Market*

The Rule of Reason requires that the challenged actions amounted to a conspiracy against the market through a concerted attempt to reduce output, drive up prices, detrimentally affect efficiency or otherwise reduce consumer welfare.<sup>156</sup> Merely proving that defendants harmed plaintiffs is insufficient in demonstrating an antitrust violation because “antitrust laws protect competition, not particular competitors.”<sup>157</sup> Accordingly, MSG was only able to allege potential injury to its own business through: (1) an inability to cross-market other businesses owned by Cablevision; and (2) lost tickets sales, sponsorship, advertising and merchandising due to “lost goodwill and reputation” because its business would be diverted to NHL.com and other team websites.<sup>158</sup>

Evidence provided by other NHL team owners, however, indicated that some teams were inefficiently utilizing their technology platforms, thereby foregoing increased e-commerce growth opportunities.<sup>159</sup> Prior to the New Media Strategy, the member teams

154. See *id.* at ¶ 55 (correlating television viewership to overall popularity to indicate lack of market power).

155. See *id.* (noting great disparity in ratings between NHL Finals and other championships). Games 1 and 2 of the 2007 Stanley Cup Finals, broadcasted on the cable channel Versus, attained ratings of less than one Nielsen point, and Games 3 through 5, aired on NBC, averaged a 1.6 rating. *Id.* In contrast, the 2007 NBA finals averaged a 6.2 rating on ABC, the 2006 World Series averaged a 10.1 on FOX, and the Super Bowl generated a 42.6 rating on CBS. *Id.* For a further discussion of the NHL’s ratings troubles, see *infra* note 121 and accompanying text.

156. See Fletcher, *supra* note 137 (describing types of harm demonstrable under Rule of Reason); see also *Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir. 1994) (providing examples of evidence to assist in proving restraint).

157. Fletcher, *supra* note 137 (stating that it is insufficient to show harm to plaintiff alone to prove violation of antitrust law). Antitrust laws are designed to protect against forbidden practices, not from individual loss of profits through continued competition. See *id.*

158. See Declaration of Scott Richman in Support of Plaintiff’s Motion for Preliminary Injunction at ¶ 9-11, *Madison Square Garden, L.P. v. NHL*, 2007 WL 3254421 (No. 07 CIV. 8455 (LAP)) (asserting diversion of Internet traffic from Rangers’ website to NHL and team websites and inability to promote own local interests would harm Rangers brand).

159. See Declaration of Keith Ritter at ¶ 6, *Madison Square Garden, L.P. v. NHL*, 2007 WL 3254421 (No. 07 CIV. 8455 (LAP)) (recounting surveys provided by team owners detailing revenue generated by new media before and after implementation of New Media Strategy).

generated approximately \$5.5 million in revenue through new media, though clubs spent approximately \$5.75 million in expenses.<sup>160</sup> As a result, financial results ranged from a league low loss of \$278,950 to a high profit of \$389,213, with most revenue resulting from broad sponsorship and advertisements that were spread across various media and not just tied to website promotion.<sup>161</sup> Under the New Media Strategy, clubs' annual expenditures would be reduced to approximately \$3.7 million per year.<sup>162</sup> Also, clubs would only need to retain a minimal technical staff to create local content.<sup>163</sup>

Moreover, even if the Rangers' complaints were construed as generally harming both interbrand and intrabrand competition, and not just MSG as a single competitor, such assertions are contradicted by other team owners.<sup>164</sup> For instance, the Minnesota Wild, owned by Minnesota Sports & Entertainment ("MSE"), a media conglomerate similar to MSG, has found that the New Media Strategy still allows for customized interconnectivity tools, such that MSE can promote its other sports and entertainment properties.<sup>165</sup> Likewise, Washington Capitals' owner Ted Leonsis emphasized that the common platform and template permitted the team to improve its local advertising and sponsorship revenue, while also attracting fans through a user-friendly web experience.<sup>166</sup>

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160. *See id.* (stating range of loss and profit prior to common platform agreement). The Rangers also operated at a loss during this period, as:

[t]he Club had only one employee working on the organization's new media business and, in 2005-06, had sustained a loss of more than \$100,000 on its new media business, including its website. The only revenue the Club had realized from its website was allocated from broader sponsorship deals, and the Club had earned no revenue from direct website sponsorship, advertising, subscriptions, ticket service providers, mailing list rental or otherwise.

*Id.* at ¶ 7.

161. *See id.* at ¶ 6 (finding even profitable teams generated majority of revenue from advertising and sponsorship deals not exclusively tied to website medium).

162. *See id.* at ¶ 15 (asserting contemplated lower operational costs).

163. *See id.* (touting decreased costs resulting from New Media Strategy).

164. For a further discussion of owners' opinions with the agreement, see *infra* notes 165-66 and accompanying text.

165. *See* Declaration of Robert O. Naegle, Jr. at ¶ 8, Madison Square Garden, L.P. v. NHL, 2007 WL 3254421 (No. 07 CIV. 8455 (LAP)) ("[T]he customized interconnectivity tools the League has provided to our website . . . allow[ ] Wild fans to link easily to all of MSE's other sports and entertainment properties, including our arena, our other professional sports franchises and our theater and concert venues."). In fact, the Wild was one of three teams that previously opposed the New Media Strategy in voting. *Id.* at ¶ 5.

166. *See* Declaration of Ted Leonsis, *supra* note 115, at ¶ 15 (contradicting MSG's assertion that centralized platform decreased ability to negotiate local sponsorships and advertisers).

More importantly, the standardized template, common technology platform and single CMS do not act to the detriment of consumers, both fans and advertisers alike.<sup>167</sup> The standardized formats, easy-to-use “best of breed” tools and cross-team linkages enhance the visitor’s experience by making navigation from one website to another familiar.<sup>168</sup> By consolidating resources and diffusing the best practices among team webmasters, the league can invest in infrastructure and new technology, as well as focus on creating content and innovative features that could be made available for all clubs.<sup>169</sup> Finally, the platform enhances the value of common space on team websites to advertisers and sponsors, and allows advertisers to efficiently purchase this space.<sup>170</sup> Based on these efficiencies, the New Media Strategy constituted appropriate action because “antitrust law permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers.”<sup>171</sup>

#### 4. *The New Media Strategy Cannot Be Achieved in a Substantially Less Restrictive Manner*

A restriction is not reasonable, however, if the objectives achieved by the restraint could be accomplished in a manner less restrictive to free competition.<sup>172</sup> The plaintiff bears the burden of proving that the challenged conduct is not reasonably necessary or

167. See *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 599 (7th Cir. 1996) (“The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem.”); see also *Sullivan v. NFL* 34 F.3d 1091, 1096 (1st Cir. 1994) (“Injury to competition has also been described more generally in terms of *decreased efficiency* in the marketplace which negatively impacts consumers.”).

168. Declaration of Franklin M. Fisher, *supra* note 116, at ¶ 50 (dispelling harm to consumers).

169. See Declaration of Keith Ritter, *supra* note 159, at ¶ 15 (“Club websites will feature ‘best of breed’ tools to, among other things, enhance podcasting, enable community building and increase video integration capabilities.”).

170. See *id.* at ¶ 38 (stressing platform efficiencies for advertisers and sponsors).

171. *Chicago Prof'l Sports Ltd. P'ship*, 95 F.3d at 598

172. See *Madison Square Garden, L.P. v. NHL*, No. 07 CV 8455 (LAP), 2007 WL 3254421, at \*9 (“The burden then shifts back to MSG to prove either that the challenged restraint is not reasonably necessary to achieve the League’s procompetitive justifications or that those objectives may be achieved in a manner less restrictive of free competition.”); see also *NASL v. NFL*, 670 F.2d 1249, 1259 (C.A.N.Y. 1982) (“[T]he existence of (less restrictive) alternatives is obviously of vital concern in evaluating putatively anticompetitive conduct.”). “One basic tenet of the rule of reason is that a given restriction is not reasonable, that is, its benefits cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits as the current restraint.” *Sullivan*, 34 F.3d at 1103.

that the same benefits could be reached though substantially less restrictive means.<sup>173</sup> For example, in *NFL v. Sullivan*, in which an uncoded league policy prevented the sale of ownership interest in an NFL club to the public through offerings of publicly traded stock, the First Circuit held that a less restrictive alternative would have yielded the same benefits as the policy in place.<sup>174</sup> Alternatively, the NFL could have amended the ownership policy to allow the sale of minority, nonvoting shares of team stock to the public with restrictions on the size of holdings by any one individual, thereby preserving the restraint's intended benefits of maintaining private control of the member teams and avoiding conflicts of interest.<sup>175</sup>

Conversely, the NHL could not have enacted a less restrictive alternative to the New Media Strategy.<sup>176</sup> Foremost, the CMS platform and standardized template were necessary to promote the NHL brand and maintain minimum quality levels on, and sufficient connectivity among, team websites.<sup>177</sup> Additionally, teams are still responsible for supplying local content, sponsorships and advertising to the common platform which is flexible enough to accommodate teams' preferences with regard to website style.<sup>178</sup> Therefore, the NHL New Media Strategy framework is reasonably structured to further common league interests while still permitting clubs to appeal to the needs of their fan base by "taking advantage of their presumably superior knowledge of local conditions and tastes."<sup>179</sup>

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173. See Pelnar, *supra* note 42, at 43 (noting burden of proof in demonstrating alternative measures).

174. See *Sullivan*, 34 F.3d 1091 at 1103 (striking down NFL policy prohibiting public ownership).

175. See *id.* (describing alternative measure to precluding ownership by public).

176. See *infra* notes 178-79 (reasoning that NHL had no alternatives to its chosen action).

177. See *Madison Square Garden, L.P. v. NHL*, No. 07 CV 8455(LAP), 2007 WL 3254421, at \*3 (S.D.N.Y. Nov. 2, 2007) (justifying New Media Strategy because of teams' under-utilization of Internet media). The New Media Committee, which found that many clubs were not making use of websites for marketing or sales promotions tools at all, failed to utilize the best practices or up-to-date technology, and had not monetized their websites. See *id.*

178. Declaration of Keith Ritter, *supra* note 159, at ¶ 15 (asserting that platform is responsive to local needs as well).

179. See Declaration of Franklin M. Fisher, *supra* note 116, at ¶ 71 (acknowledging benefits for both league entity and individuals teams).

### C. NHL Could Successfully Assert the “Single Entity” Defense

#### 1. “Unity of Interest” Standard in *Copperweld Corp. v. Independence Tube Corp.*

The *Copperweld* or “single entity” defense proposes that the coordinated activity of a parent corporation and its wholly-owned subsidiary must be viewed as a single enterprise with “complete unity of interest.”<sup>180</sup> A complete unity of interest exists when “[t]heir objectives are common . . . [and] their . . . actions are guided or determined not by two separate corporate consciousnesses, but one.”<sup>181</sup> Accordingly, ownership and control are essential in a determination of whether unity of purpose and action exist.<sup>182</sup> Once a parent company and its subsidiary are found to be acting as one entity, the parent is incapable of engaging in a combination or conspiracy in violation of antitrust law, since a single enterprise cannot conspire with itself.<sup>183</sup> In addition, the single entity defense offers a flexible approach in response to the increasing complexity of corporate operations, so that the substance of the business enterprise, and not the form, determines whether economic actors can be considered a singular unit.<sup>184</sup>

#### 2. *Early Application to Professional Sports Leagues*

Courts have demonstrated a prevailing hostility towards the single entity defense in the context of traditionally structured sports

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180. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (finding that parent and subsidiary may have “unity of purpose or a common design” for antitrust purposes).

181. *Id.* at 771 (defining unity of interest).

182. See *id.* at 780 (“Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective.”); see also Dean V. Williamson, *Organization, Control, and the Single Entity Defense in Antitrust*, at 7 (Jan. 2006), <http://www.usdoj.gov/atr/public/eag/221876.pdf> (last visited February 29, 2008) (“The suggestion in *Copperweld* and in the entire body of single entity case law is plain: ‘ownership’ and ‘control’ are related, and both inform analysis of the single entity question.”).

183. See *Copperweld*, 467 U.S. at 771 (“[C]oordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a ‘single enterprise’ for purposes of § 1 of the Sherman Act.”); see also Williamson, *supra* note 181, at 3 (“Defining any one type of corporate structure as a single entity relieves it from scrutiny, because one needs more than one distinct entity to allege a conspiracy.”).

184. See *Copperweld*, 467 U.S. at 772 (explaining that antitrust liability should not depend on how corporate subunit is organized, whether as unincorporated division or wholly-owned subsidiary). Allowing combination or conspiracy between a parent and subsidiary would “elevate[ ] form over substance – while in form the two corporations are separate legal entities, in substance they are a single integrated enterprise and hence cannot comprise the plurality of actors necessary to satisfy § 1.” *Id.* at 789.

leagues, continually resolving that teams are individual actors and not components of a single enterprise.<sup>185</sup> Foremost, in *NCAA*, the Supreme Court stated that a sports league, like other joint ventures, has “no immunity from the antitrust laws.”<sup>186</sup> The *Copperweld* defense was more definitively rebuffed in *North American Soccer League v. NFL*, in which the Second Circuit explained that a single-entity loophole for sports leagues would eliminate “antitrust responsibility for any restraint . . . that would benefit the[ ] league . . . even though the benefit would be outweighed by its anticompetitive effects.”<sup>187</sup> Also, more recently, the Sixth Circuit held that member clubs of the Ontario Hockey League in Canada constituted multiple actors who acted in concert, and not as a single entity, in a claim that the teams engaged in conspiracy to restrain trade by adopting an eligibility rule for “overage” players.<sup>188</sup>

### 3. *Refinement of Analysis in Chicago Professional Sports Ltd. Partnership v. NBA*

In contrast, in a later dispute between the Chicago Bulls and NBA over national broadcast rights, the Seventh Circuit ruled that professional sports leagues can potentially be construed to be acting as a single entity in certain circumstances, “depending on which facet of the business one examines;” therefore, the single entity

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185. See Posting of Marc Edelman to Sports Law Blog, *MSG v. NHL II: Can the NHL Apply a Single-Entity Defense Based on American Needle?*, <http://sports-law.blogspot.com/2007/10/msg-v-nhl-ii-can-nhl-apply-single.html> (Oct. 8, 2007, 11:06 EST) [hereinafter *MSG v. NHL II*] (stating that courts have typically rejected the single entity defense as applied to sports leagues); see also *NASL v. NFL*, 670 F.2d 1249, 1257 (C.A.N.Y. 1982) (“The theory that a combination of actors can gain exemption from [section] 1 of the Sherman Act by acting as a ‘joint venture’ has repeatedly been rejected by the Supreme Court and the Sherman Act has been held applicable to professional sports teams by numerous lesser federal courts.”).

186. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 113 (1984) (finding joint ventures amenable to antitrust violations).

187. *NASL*, 670 F.2d at 1257 (rejecting single entity exemption status for professional sports leagues). “[T]he restraint might be one adopted more for the protection of individual league members from competition than to help the league.” *Id.*

188. See *NHLPA v. Plymouth Whalers*, 419 F.3d 462, 469 (6th Cir. 2005) (finding hockey league to be multiple actors and not single entity, since existence was only constituted by twenty member teams). The OHL rules permitted each team to carry only three twenty-year old, “overage” players. *Id.* at 466. Furthermore, under Rule 7.4, no overage player could be signed by an OHL team without previously playing in the Canadian Hockey Association (“CHA”) or USA Hockey Player’s Registration the previous season. See *id.* As a result, certain NCAA players, who were not permitted to hold either type of registration, were precluded under the “overage” eligibility rule. See *id.*

question of *Copperweld* should be posed on a case-by-case basis.<sup>189</sup> The court noted that, unlike the NCAA, which was defined as a joint venture by the Supreme Court, the NBA “has no existence independent of sports” and was created only to “make” professional basketball teams and games.<sup>190</sup>

Based on *Copperweld*, “NBA Basketball” could be viewed as one product from a single source when selling broadcast rights to a network, in competition with a multitude of other producers of entertainment, “just as General Motors is a single firm even though a Corvette differs from a Chevrolet.”<sup>191</sup> In other instances, though, NBA teams act more like distinct and independent firms in a monopsony, such as when college basketball players seek to sell their skills in order to be drafted.<sup>192</sup> In these cases, the NBA would best be understood as a joint venture for antitrust purposes because the league curtails competition for players who have few other market opportunities.<sup>193</sup>

Additionally, the court rejected the “complete unity of interest” determination in *Copperweld*, holding that whether an enterprise is conflict-free is not necessarily dispositive in the determination of whether the league is a single entity.<sup>194</sup> Rather, *Copperweld* proposed that the concerted action requirement exists simply to scrutinize conduct that “deprives the marketplace of the independent centers of decision-making that competition as-

189. See *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 598 (7th Cir. 1996) [hereinafter *Bulls II*] (“*Copperweld* does not hold that only conflict-free enterprises may be treated as single entities. Instead it asks why the antitrust laws distinguish between unilateral and concerted action, and then assigns a parent-subsidiary group to the ‘unilateral’ side in light of those functions.”). In *Bulls II*, the Chicago Bulls sought to increase the number of games televised on WGN from 25 or 30 games to 41, while the NBA sought to impose a “tax” on nationally broadcast games. *Id.* at 595.

190. *Id.* at 599 (structuring NBA and teams as single entity in production of “NBA Basketball” product).

191. *Id.* at 598 (holding NBA to be one firm for purpose of selling broadcasting rights because single product is produced and cooperation is essential).

192. See *id.* at 599 (illustrating how leagues may constitute single entities based on facet of business examined).

193. See *id.* (suggesting NBA would not be considered single entity for draft purposes).

194. *Id.* at 598 (finding even single firm may not have complete unity of interest); see also *Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 277 (8th Cir. 1988) (“Even though the cooperatives may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that they are independent sources of that power.”). “Their power depends, and has always depended, on the cooperation among themselves . . . . The disagreements we have described are more like those among the board members of a single enterprise, than those among enterprises which are themselves separate and independent.” *Id.*



sumes.”<sup>195</sup> Despite concluding that the league is closer to one enterprise than a group of independent firms when acting in the broadcast market, the Seventh Circuit stopped short of declaring the NBA a single entity and remanded the case for a fact-specific inquiry into the nature of the league.<sup>196</sup>

4. *Finding the Existence of a Single Entity in American Needle, Inc. v. New Orleans, Louisiana Saints*

The single entity defense was successfully applied in *American Needle*, which arose from a dispute between NFL Properties and American Needle, Inc. over NFL-delegated intellectual property rights.<sup>197</sup> NFL Properties, which held the responsibility of assisting in the development and protection of various marks, as well as implementing marketing strategies for the league, had granted American Needle a license to use the league’s trademarks to manufacture headwear.<sup>198</sup> When NFL Properties entered into an exclusive licensing agreement with Reebok in 2000, American Needle lost its license and promptly sued under section 1.<sup>199</sup>

The District Court for the Northern District of Illinois dismissed the claim under the single entity defense, concluding that the NFL member teams had so integrated their operations as to create a single enterprise for licensing purposes, rather than a joint venture cooperating for a common purpose.<sup>200</sup> The court emphasized that the NFL was structured to maintain a competitive balance, since teams agreed to share equally in the market and had

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195. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984) (distinguishing concerted action from unilateral behavior).

196. *See Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d at 600, 602 (“[W]e conclude that when acting in the broadcast market the NBA is closer to a single firm than to a group of independent firms.”).

197. *See Am. Needle, Inc. v. New Orleans, Louisiana Saints*, 496 F. Supp. 2d 941, 942 (N.D. Ill. 2007) (describing assignment of intellectual property rights to NFL Properties by team owners).

198. *See id.* (detailing responsibilities of NFL Properties under various agreements).

199. *See id.* (stating that antitrust suit arose when NFL Properties granted exclusive licensing rights to Reebok).

200. *See id.* at 943 (finding NFL and teams acted as single entity for licensing of intellectual property). *See generally Am. Needle Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008) (affirming district court decision). “Simply put, nothing in § 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers. Indeed, antitrust law encourages cooperation inside a business organization – such as, in this case, a professional sports league – to foster competition between that organization and its competitors.” *Id.* at 744.

done so continuously since 1963.<sup>201</sup> Through NFL Properties, the clubs had acted as an undivided economic unit by sharing equally in the market and, as a result, each separate ownership group, in essence, had no economic significance in and of itself.<sup>202</sup>

The decision, however, was greatly criticized due to its “ cursory analysis” and disregard for existing case law that had deemed the single entity defense inapplicable to sports leagues.<sup>203</sup> Critics chided the implication that, because the NFL had been merchandising paraphernalia in a collective manner through its history, such “ prolonged collusion” could transform a joint venture into a single entity.<sup>204</sup>

### 5. MSG Can Successfully Establish a Single Entity Defense

Is the NHL a joint venture comprised of separate teams acting jointly or a single firm controlled by a board of directors with regard to the New Media Strategy?<sup>205</sup> The NHL has two analyses at its disposal in arguing that the league constitutes a single entity for Internet marketing purposes, one categorizing antitrust claims as either labor or non-labor disputes, the other appealing to the economic concept of complementarity.<sup>206</sup>

#### a. The NHL as a Single Entity Under *Copperweld*'s “Unity of Interest”

To assert a single entity defense based on the rationale of *Copperweld*, the NHL must illustrate that the league is effectively inte-

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201. See *Am. Needle, Inc.*, 496 F. Supp. 2d at 943 (“There is no sudden joining of independent sources of economic power previously pursuing separate interests. NFL Properties has been making the decisions unilaterally or jointly since 1963.”). The court also emphasized that “[d]elegated decision-making does not deprive the marketplace of independent centers of decision-making.” *Id.*

202. See *id.* at 944 (holding NFL acted as single unit, and American Needle never dealt with any teams exclusively).

203. See *MSG v. NHL II*, *supra* note 184 (rebuking court in *American Needle* for lack of detailed explanation for its ruling).

204. *Id.* (criticizing that opinion seemed to imply that, because NFL had been merchandising team paraphernalia collectively for many years, it was automatically transformed from joint venture to single entity). “A single-entity defense based on prolonged collusion by multiple entities is simply illogical.” *Id.*

205. See Mathias, *supra* note 40, at 212 (distinguishing joint ventures from single entities).

206. See generally Nathaniel Grow, Note, *There's No “I” in “League:” Professional Sports Leagues and the Single Entity Defense*, 105 Mich. L. Rev. 183, 201 (2006) (dividing between labor and non-labor antitrust claims); see also Williamson, *supra* note 182, at 4 (analyzing antitrust cases under complementarity test).

grated as a single entity with an economic “unity of interest.”<sup>207</sup> The *Copperweld* test is an inquiry into the concentration of control rights; the alleged single entity must demonstrate a hierarchical structure in which it delegates functions to other units who either possess no rights of control or maintain some control that may nonetheless be abrogated.<sup>208</sup>

For the NHL to successfully evince that it operates as a single entity, it should seize upon the categorization insinuated in *Bulls II* and distinguish existing antitrust case law involving league labor disputes and suits by players against team owners from entirely non-labor suits to better categorize where a “unity of interest” exists.<sup>209</sup> In the context of labor disputes, the various teams comprising the league do not share a common goal but, instead, have divergent concerns in the labor market.<sup>210</sup> Though teams typically depend on competitive balance and low labor costs, each is still primarily focused on obtaining the best players, coaches and management personnel possible because winning increases ticket and merchandising revenue, leading to greater overall profits.<sup>211</sup> Therefore, the unity of economic interest in labor disputes is not sufficient to satisfy the *Copperweld* standard.<sup>212</sup> Likewise, the economic realities of labor disputes also fail to justify granting sports leagues antitrust exemption in such instances because owners could exploit an anti-trust exemption to implement unilateral, abusive labor practices without consulting player unions.<sup>213</sup>

In contrast, traditionally-structured sport leagues such as the NHL should be considered single entities for non-labor antitrust disputes because of their structure as single firms.<sup>214</sup> Foremost,

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207. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (defining standard for exemption as “complete unity of interest”).

208. See Williamson, *supra* note 182, at 12 (finding “ownership” and “control” central to single entity claim under *Copperweld*).

209. Grow, *supra* note 206, at 188 “In applying *Copperweld* to professional sports leagues, the circuit courts have failed to distinguish between suits involving nonlabor disputes and those involving suits by players against team owners.”)

210. See *id.* at 205 (explaining that, in labor matters, teams vie against one another as competitors).

211. See *id.* at 206 (listing reasons why teams are not acting with one interest).

212. See *id.* (concluding that interests of teams diverge in labor market).

213. See *id.* at 207-08 (“Granting professional sports leagues single entity protection in labor disputes would run contrary to Supreme Court precedent and would jeopardize players’ ability to enforce their rights under current labor law doctrine.”).

214. See Williamson, *supra* note 182, at 10 (“Traditional corporate hierarchy constitutes an obvious benchmark against which to contrast ‘economic unity’ in other governance structures, and it constitutes a benchmark that *Copperweld* and succeeding case law inserted into the single entity case law.”).

professional teams, and particularly those in the NHL, generate most of their revenue locally from ticket sales and the licensing of television broadcasts.<sup>215</sup> Because the overwhelming majority of teams within a league operate in different media markets, they predominantly sustain a hometown fan base.<sup>216</sup> As a result, economic competition only occurs amongst each league as opposing forms of entertainment.<sup>217</sup>

Moreover, the NHL, like most other professional leagues, also operates under a revenue-sharing agreement, as teams in the bottom half of league revenue that reside in demographic market areas of 2.5 million or fewer television households are entitled to league assistance.<sup>218</sup> Because of this revenue allocation, the economic success of each member team in the NHL is directly dependant upon the profitability of other clubs.<sup>219</sup>

Finally, much like in *Bulls II* and *American Needle*, where agreements voted on and approved by team owners granted central control of national broadcasting and merchandising rights to the league, the NHL owners have ceded their authority to independently operate team websites in order to create a national brand through the distribution and exploitation of intellectual property rights on the web.<sup>220</sup> In fact, even where clubs have retained certain rights to use their marks for local Internet marketing efforts, their activities are still subject to NHL control and must be consis-

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215. See Grow, *supra* note 206, at 192 (stating that most revenue of teams derived at local level); see also McErlain, *supra* note 13 (providing breakdown of NHL revenue).

216. See Grow, *supra* note 206, at 193 (noting majority of teams typically do not compete for fan loyalty but operate in different media markets).

217. See *id.* (proposing that various professional sports teams in same city compete amongst each other for fans, not teams within sport in different locales). "MLB's Detroit Tigers compete for Detroiters' entertainment dollars with the NBA's Detroit Pistons, the NFL's Detroit Lions, and the NHL's Detroit Red Wings, in addition to other forms of entertainment, such as movies, theater, and concerts." *Id.*

218. See NHL.com - Collective Bargaining Agreement FAQs, <http://www.nhl.com/nhlhq/cba/index.html> (last visited Feb. 29, 2008) (explaining revenue-sharing agreement in current CBA).

219. See *id.* (illustrating that teams share common interest in management and economic growth of league). "All Clubs that: (1) are ranked in the bottom half (bottom 15) in League revenues, and (2) operate in markets with a Demographic Market Area of 2.5 million or fewer TV households" qualify for revenue-sharing subsidies. *Id.*

220. See *Madison Square Garden, L.P. v. NHL*, No. 07 CV 8455(LAP), 2007 WL 3254421, at \*2 (S.D.N.Y. Nov. 2, 2007) (describing that NHL granted Commissioner broad discretion over intellectual property rights, including "authority to make directives regarding advertising and merchandising rights").

tent with the league's licensing activities.<sup>221</sup> Therefore, because the NHL maintains ultimate authority over general league decision-making, and specifically in the context of intellectual property rights through agreements approved by the Board of Governors, it should be found to possess the requisite unity of interest to satisfy the single entity exemption.<sup>222</sup>

b. The NHL as a Single Entity Under "Actual or Potential Competitors" Test

If the NHL fails to constitute a single entity under a strict economic unity test, the league could also be viewed as one enterprise under a more comprehensive "actual or potential competitors" test.<sup>223</sup> The actual or potential competitors test, proposed in *Mt. Pleasant v. Associated Electric Cooperative*, is one of complementarity, testing the extent that the candidate single entity joins complementary assets, capabilities or other inputs together.<sup>224</sup>

Two types of complementarity drive the economics of sports leagues, demand-side network effects and supply-side network effects.<sup>225</sup> Demand-side network effects reflect that the production of goods or services requires the input of multiple entities, as parties collectively contribute complementary raw materials, without which each party would be unable to compete effectively.<sup>226</sup> For professional sports leagues, teams contribute such inputs through the "production" of games; teams constitute complements, not actual or potential competitors, because consumers perceive the value of games based on the number of participating teams in the "network."<sup>227</sup>

Though demand-side network effects alone may justify viewing teams as a single entity, supply-side network effects, such as league-sanctioned standards and the promotion of league-sanctioned com-

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221. See Declaration of Franklin M. Fisher, *supra* note 116, at ¶ 21 (asserting extent of control of NHL in exploitation of intellectual property rights).

222. See *Madison Square Garden*, 2007 WL 3254421, at \*2 (describing unanimous resolutions by team owners to give NHL exclusive control over Internet rights).

223. See Williamson, *supra* note 182, at 4 ("A finding that restraints are horizontal is tantamount to a finding that parties are not contributing complementary inputs and that the parties are 'actual or potential competitors.'").

224. See *id.* (providing factors by which control can be assessed).

225. See *id.* (delineating types of network effects to demonstrate economic production of leagues as single entity).

226. See *id.* (showing singularity in action because each actor alone would be unable to produce product otherwise).

227. See *id.* (explaining how teams act as single entity to produce games).

petition, strengthen the structure of sports leagues as single entities for antitrust purposes and not cartels of competitors.<sup>228</sup> Restraints imposed by the governing bodies of professional sports leagues are designed to promote the commercialization of the league as a branded product.<sup>229</sup> Thus, because they are a critical contribution to the final production of games, league-imposed restraints can be viewed as "vertical" and not illegal "horizontal" restraints.<sup>230</sup>

For instance, in *Bulls II*, the Seventh Circuit emphasized the production of "NBA Basketball" games, not generic "professional basketball games," to imply that the NBA as a governing body contributes complementary inputs into the production of games, particularly by supplying the "NBA" brand to a league-wide marketing effort.<sup>231</sup> Likewise, the league can contribute to production of league-branded games by imposing standards in rule-making and organizing competition between member teams.<sup>232</sup>

Similarly, the NHL must emphasize that combination is essential to produce the ultimate "NHL Hockey" product, even though each franchise is independently owned.<sup>233</sup> As previously mentioned, the centralized CMS and standardized layout created by the New Media Strategy collectively serve as a key element in the league's growth as a national brand.<sup>234</sup> The common website platform allows for one distribution mechanism whereby the league exploits the economic value of its intellectual property rights under the "NHL Brand."<sup>235</sup>

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228. See *id.* (expounding that league as governing body further shapes unity of purpose of sports leagues).

229. See Williamson, *supra* note 182, at 24 (finding that league allows for brand identification of product by entity).

230. See *id.* (concluding that action in creating league brand was accomplished vertically, not horizontally).

231. See Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 599 (7th Cir. 1996) (finding "NBA Basketball" produced by NBA and teams).

232. See Williamson, *supra* note 182, at 23 (providing other complementary inputs to production of games by NBA).

233. See Grow, *supra* note 206, at 186-87 ("One, two, or even a handful of teams cannot produce the ultimate league product: championship athletic competition."). "[M]aintaining competitive balance necessarily requires interaction among all teams in the league. Without a league structure to create and uphold competitive balance, competitions would just be glorified 'pick-up games.'" *Id.* at 196; see also Declaration of Franklin M. Fisher, *supra* note 116, at ¶ 9 (finding structured manner of NHL allows for more marketable product than simply different squads playing one another).

234. See Madison Square Garden, L.P. v. NHL, No. 07 CV 8455(LAP), 2007 WL 3254421, at \*6 (S.D.N.Y. Nov. 2, 2007) (ruling New Media Strategy primary to promoting national brand and competing against other entertainment entities).

235. See *id.* (reciting brand-building strategy).

Finally, the league could refer to the precedential standard set in *San Francisco Seals, Ltd. v. NHL*, which extended single entity status to the NHL for purposes of team relocation, based on a complementarity analysis.<sup>236</sup> In *San Francisco Seals*, the District Court for the Central District of California concluded that the league and teams were not economic competitors but rather, members of a single unit competing with other similar professional leagues and bound under an organizational scheme approved by all team members through the Board of Governors.<sup>237</sup> Therefore, the league could analogize the New Media Strategy to the Board of Governors-approved agreement in *San Francisco Seals* to illustrate action as a single entity, because in both instances, owners officially relinquished individual rights for the purpose of centralized decision-making to better compete with entertainment generated by other professional sports, as well as “produc[e] sporting events of uniformly high quality . . . so as to assure all members of the league the best financial return.”<sup>238</sup>

#### V. FIVE FOR FIGHTING: THE IMPACT OF *MSG v. NHL*

The denial of a preliminary injunction by the District Court for the Southern District of New York appropriately maintains the status quo for suits brought against professional sports leagues under the Sherman Act through strict adherence to the rationale of *NCAA* and its progeny.<sup>239</sup> The decision further reinforces the legitimacy of collectivization by teams through a central league entity, acknowledging the importance of unity to foster successful national sports brands.<sup>240</sup> Likewise, the holding protects smaller-market teams from second-class status and promotes balanced competi-

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236. See generally *San Francisco Seals, Ltd. v. NHL*, 379 F.Supp. 966 (D.C. Cal. 1974) (holding league and teams acting together as one single business enterprise competing against other professional leagues).

237. See *id.* at 969 (“As a member team, it will continue cooperating with the defendants in pursuit of its main purpose, i.e., producing sporting events of uniformly high quality appropriately scheduled as to both time and location so as to assure all members of the league the best financial return.”). “In this respect, the plaintiff and defendants are acting together as one single business enterprise, competing against other similarly organized professional leagues.” *Id.*

238. *Id.*

239. For a discussion on the decision’s conformity with existing case law, see *supra* notes 85-236 and accompanying text.

240. For a discussion on the importance of production of league brands see *supra* notes 189-96 and accompanying text.

tion.<sup>241</sup> At the same time, MSG also greatly expands the extent of leagues' control and ability to exploit teams' intellectual property and marketing from the traditional realms of broadcast media and licensing to the Internet.<sup>242</sup> In short, through this decision, sports leagues including the NHL are encouraged to continue to create markets and structure integration agreements for efficiency and maximum profitability to promote a better product both on and off the playing field. . . or ice.<sup>243</sup>

By avoiding the single entity question, however, the district court in *MSG* left unresolved the more pressing question of whether the NHL and other professional sports leagues should be susceptible to antitrust violations at all.<sup>244</sup> Though any ruling by the court would not have resolved whether leagues are considered single entities in other jurisdictions – and, in fact, would actually have created further discord amongst the circuits – it could have provided the first clear bright-line economic analysis and justification of the circumstances and rationale under which professional sports leagues should be exempt from antitrust violations.<sup>245</sup>

If recognized as single entities for non-labor purposes, traditional sports leagues would benefit from the knowledge that they can freely restructure and reorganize their operations to best serve league interests without having to raise assumptions of illegitimate motives.<sup>246</sup> By contracting to place decision-making power in the hands of a central league office, a league can make decisions that serve the purposes of the league as a whole, rather than individual owners.<sup>247</sup> Furthermore, single entity status would allow leagues to

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241. For a discussion on the competitive balance on the field created through collectivization and exploitation of intellectual property rights, see *supra* notes 118-20 and accompanying text.

242. See generally *Madison Square Garden, L.P. v. NHL*, No. 07 CV 8455 (LAP), 2007 WL 3254421 (S.D.N.Y. Nov. 2, 2007) (recognizing procompetitive efficiencies of Internet and new media restraints).

243. For a discussion of the justifications for collectivizing intellectual property and marketing rights in new media, see *supra* notes 112-34 and accompanying text.

244. See *Grow*, *supra* note 205, at 187 (finding single entity defense to be an ongoing problem for professional sports leagues).

245. See *id.* ("In the twenty-two years since *Copperweld*, attempts by sports leagues to advance the single entity defense have received a mixed response from the circuit courts."). The Second, Ninth, and D.C. Circuits have not reviewed the defense since *Copperweld*. See *id.* The First and Eighth Circuits have ruled against a single entity exemption for sports leagues. See *id.* The Seventh Circuit has found that leagues may be single entities for some purposes. See *id.*

246. See *Mathias*, *supra* note 40, at 220 n.189 (noting general presumption of valid motives under single entity status).

247. See *id.* at 220 ("[T]he corporate league can prevent franchises from relocating, realign divisions, and otherwise make decisions that serve the purposes of



more easily achieve economies of scale through increased purchasing power.<sup>248</sup> Finally, a single entity exemption would serve the practical purpose of decreasing litigation costs for in-fighting occurring within professional sports leagues, since teams would be forced to challenge league restrictions as abuses of monopoly power under section 2 of the Sherman Act, a more difficult claim to establish.<sup>249</sup>

Until the single entity defense is accepted, however, the NHL and other professional sports leagues will be continually threatened with visits to the antitrust penalty box, as teams repeatedly instigate fights over the control of league production.<sup>250</sup>

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the league as a whole rather than individual owners.”). A single entity model would also protect the league from certain actions of an individual owner, such as over-spending. *See id.* at n.98.

248. *See id.* (finding single entity status assists in market strength).

249. *See id.* at 214 (recognizing curtailing of antitrust claims if sports leagues recognized as single entities). Section 2 is violated only when a firm possesses monopoly power in a particular market and engages in behavior that is abusive of that power. *See id.* at 206. Thus, “[t]he requirement that a section 2 defendant possess monopoly power makes a section 2 claim much more difficult to pursue than an action under section 1, which has no such requirement.” *Id.*

250. *See* Grow, *supra* note 206, at 184 (“Like many other sectors of the national economy, professional sports have faced antitrust scrutiny – but arguably no other sector has faced a more haphazard application.”). “[B]ecause . . . [the] [c]ircuits have not re-examined the issue since *Copperweld*, their early, nonsingle entity precedent has never been reversed. This single entity question remains a live concern, as professional sports leagues continue to face antitrust challenges.” *Id.* at 187.

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